No. 126, Original

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF KANSAS, PLAINTIFF

v.

STATE OF NEBRASKA

AND

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

The State of Kansas seeks leave to commence an original action to enforce its rights under the Republican River Compact, which was approved by Congress in the Act of May 26, 1943, ch. 104, 57 Stat. 86. See Add. 1a-13a. The Compact allocates the "virgin water supply" of the Republican River Basin among the States of Colorado, Kansas, and Nebraska. See Compact Arts. II-IV (Add. 3a-7a). Kansas alleges that Nebraska has exceeded its Compact allocation by allowing pumping and consumption of groundwater that should be included as part of the allocated water supply. See Compl. ¶ 7; Br. in Support of Compl. 2. Nebraska responds that this Court should deny Kansas's motion for leave to file a complaint because Kansas has failed to show that Nebraska's actions have violated Kansas's rights or caused Kansas injury. See Br. in Opp. 5. Kansas does not seek relief against

Colorado, and Colorado takes no position on Kansas's motion for leave to file a complaint. See Kan. Br. in Support of Compl. 2; Letter from First Ass't Attorney Gen. of Colo. to the Chief Deputy Clerk of the Court (July 28, 1998).

A. The Republican River Basin

The Republican River Basin is a 24,900-square-mile watershed, approximately 430 miles in length, that encompasses parts of northeastern Colorado (7,700 square miles), southwestern Nebraska (9,700 square miles), and northern Kansas (7,500 square miles). The Basin is drained by the Republican River, which is formed by the junction of two streams that originate in Colorado, the Arikaree and North Fork Republican Rivers. From that originating point, near Haigler, Nebraska, the Republican River flows easterly through Nebraska and then southeasterly to Junction City, Kansas, where it joins the Smoky Hill River to form the Kansas River. The Republican River Basin also includes numerous smaller streams that flow into the Republican River. The Basin, which is part of the Great Plains, is sparsely populated. It contains fertile farmland and typically receives from 18 to 30 inches of precipitation per year. See Bureau of Reclamation, U.S. Dep't of Interior, *Resource Management Assessment: Republican River Basin* 3-6, 43, 44-48 (July 1996) (A copy of this report has been lodged with the Clerk of the Court.)

During the 1930s, the United States, as well as the States of Colorado, Kansas, and Nebraska, developed an interest in harnessing the water resources of the Republican River Basin. The Basin had experienced an extended drought, interrupted in 1935 by a deadly and destructive flood. In light of those experiences, the federal and state governments examined whether the Republican River's spring flows could be impounded in reservoirs for flood control and released in the late summer and fall for irrigation. See H.R. Doc. No. 842, 76th Cong., 3d Sess. (1940) (Corp of Engineers pre-

liminary examination and survey of Republican River); see also H.R. Doc. No. 195, 73d Cong., 2d Sess. 158-186 (1934) (Corps of Engineers preliminary examination and survey of the Kansas River, discussing irrigation potential in the Republican River Basin). Based on the Corps of Engineers' recommendations in House Document No. 842, Congress authorized appropriations to construct the Harlan County Reservoir, in Nebraska, for flood control purposes. See Act of Aug. 18, 1941, ch. 377, 55 Stat. 646.

The Interior Department's Bureau of Reclamation, which has primary responsibility for irrigation projects, also examined the Republican River Basin, relying in part on the Corps' examination set forth in House Document No. 195, *supra*. See Bureau of Reclamation, U.S. Dep't of Interior, *Project Investigations Report No. 41*, at 1-2 (1940). The Bureau concluded that federal irrigation projects were feasible. *Id.* at A-D (Synopsis). It indicated, however, that those projects should not be constructed until the three States had resolved the question of interstate allocation of the Basin's water resources. *Id.* at 1 ("To avoid expensive litigation as a result of possible conflicting uses of water in the various states, further developments for irrigation should be preceded by a three-state compact or other similar agreement on the use of water."). The States of Colorado, Kansas, and Nebraska, which had been discussing the possibility of an interstate compact for a number of years, thereafter entered into negotiations to formulate an interstate compact.[1]

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[1] The States initially sought congressional authorization to enter into a compact before they had negotiated its terms. See H.R.J. Res. 406, 76th Cong., 3d Sess. (1940); see also 86 Cong. Rec. 58 (1940) (remarks of Rep. Curtis). The Department of War objected on the ground that Congress should not give its consent to a compact without knowing its content, and the House Committee on Flood Control responded by amending House Joint Resolution 406 to require congressional approval before the compact

B. The Compact Approval Process

In 1941, the States completed their negotiations and ratified a proposed compact, which was then submitted to Congress for approval in accordance with the Compact Clause of the Constitution, U.S. Const. Art. I, § 10, Cl. 3. See S. 1361, 77th Cong., 1st Sess. (1941); H.R. 5945, 77th Cong., 1st Sess. (1941); S. Rep. No. 841, 77th Cong., 1st Sess. (1941). The Department of the Interior and the Federal Power Administration objected to the compact primarily because it contained language curtailing federal jurisdiction over the Republican River. See *Republican River Compact: Hearings on H.R. 4647 and H.R. 5945 Before the House Comm. on Irrigation and Reclamation*, 77th Cong., 1st Sess. (1941).

The House Committee on Irrigation and Reclamation amended the House bill in response to the federal agencies' objections, H.R. Rep. No. 1380, 77th Cong., 1st Sess. (1941), but the Senate rejected the House amendments, 87 Cong. Rec. 9606-9623 (1941). The Senate's proposed legislation prevailed in conference, and the Senate and the House approved the conference proposal. See H.R. Conf. Rep. No. 1878, 77th Cong., 2d Sess. (1942); 88 Cong. Rec. 2408-2409 (1942); 88 Cong. Rec. 2813-2814 (1942). The President, however, vetoed the bill on the basis of the federal agencies' objections. See 88 Cong. Rec. 3285-3286 (1942); H.R. Doc. No. 690, 77th Cong., 2d Sess. (1942) (veto message). The President explained that he "would be glad to approve a bill, which, in assenting to the compact, specifically reserves to the United States all of the rights and responsibilities which it now has in the use and control of the waters of the basin." H.R. No. Doc. 690, *supra*, at 2.

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could take effect, see H.R. Rep. No. 2707, 76th Cong., 3d Sess. (1940). That resolution, however, did not pass, and the States entered into negotiations without advance congressional authorization or the direct participation of the federal government. See 87 Cong. Rec. A2179 (1941) (remarks of Rep. Curtis).

Following the President's veto, Congress enacted legislation authorizing state commissioners to conduct further compact negotiations and providing for participation by a federal representative. See Act of Aug. 4, 1942, ch. 545, 56 Stat. 736. The state commissioners and the federal representative completed their negotiations on December 31, 1942, and the state legislatures of Colorado, Kansas, and Nebraska promptly ratified the proposed compact. See Colo. Rev. Stat. Ann. §§ 37-67-101 *et seq.* (1990); Kan. Stat. Ann. § 82a-518 (1991); Neb. Rev. Stat. Vol. 2a, App. 1-106 (1995). The States then submitted the compact for congressional approval in accordance with the Compact Clause and the Act of Aug. 4, 1942. Congress held hearings, considered reports favoring the proposed compact, and enacted legislation granting congressional approval, which the President signed. Act of May 26, 1943, ch. 104, 57 Stat. 86.[2]

C. The Republican River Compact

The Republican River Compact consists of eleven articles that set out a mechanism for dividing the water supply of the Republican River Basin and address issues arising from the prescribed allocation.

Article I identifies the purposes of the Compact as follows: (1) "to provide for the most efficient use of the waters of the Republican River Basin"; (2) "to provide for an equitable division of such waters"; (3) "to remove all causes, present and future, which might lead to controversies"; (4) "to

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[2] See S. 649, 78th Cong., 1st Sess. (1943); H.R. 1679, 78th Cong., 1st Sess. (1943); H.R. 2482, 78th Cong., 1st Sess. (1943); *Flood Control in the Basin of the Republican River: Hearing on S. 649 Before the Senate Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943); *Republican River Compact: Hearings on H.R. 1679 and H.R. 2482 Before the House Comm. on Irrigation and Reclamation*, 78th Cong., 1st Sess. (1943); S. Rep. No. 152, 78th Cong., 1st Sess. (1943); H.R. Rep. No. 375, 78th Cong., 1st Sess. (1943); 89 Cong. Rec. No. 3549-3551 (1943) (Senate passage); *id.* at 4534-4536 (House passage); *id.* at 4907 (Presidential approval).

promote interstate comity"; (5) "to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use"; and (6) "to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods." Add. 2a.

Article II clarifies the meaning of relevant terms. It defines the "Basin" as "all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas," and it incorporates by reference a map showing the Basin. Add. 3a. Article II defines the "Virgin Water Supply" to be "the water supply within the Basin undepleted by the activities of man." Add. 3a. And it correspondingly defines "Beneficial Consumptive Use" to be "that use by which the water supply of the Basin is consumed through the activities of man." Add. 3a.

Article III next specifies the "computed average annual virgin water supply" of a series of specific drainage areas within the Basin, which in aggregate amount to a total estimated water supply of 478,900 acre-feet per year. Add. 4a. Those computed averages, expressed in acre-feet of water, represent the historic virgin water supply originating above "the lowest crossing of the [Republican River] at the Nebraska-Kansas state line." Add. 4a. The Compact relies on those historic water supply averages as the basis for allocating future supplies among the States. Article III recognizes, however, that year-to-year flows may vary, and it accordingly states that "[s]hould the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased" proportionately. Add. 4a-5a.

Article IV sets out the allocation to each State, expressed in acre-feet per year, for each of the drainage areas that Article III identifies. Add 5a-7a. Article IV allocates the entire estimated water supply set forth in Article III, giving

Colorado an aggregate of 54,100 acre-feet per year (Add. 5a), Kansas an aggregate of 190,300 acre-feet per year (Add. 5a-6a), and Nebraska an aggregate of 234,500 acre-feet per year (Add. 6a-7a). In addition, Article IV recognizes that Kansas is entitled to "the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line." Add. 6a.

Articles V through IX set forth various rights and obligations relating to the allocation. Article V recognizes the continuing vitality of a prior judgment of this Court, *Weiland* v. *Pioneer Irrigation Co.*, 259 U.S. 498 (1922), which involved a dispute between Colorado and a Nebraska irrigation district over the district's diversion of water in Colorado for use in Nebraska. See Add. 7a. Articles VI through VIII allow a downstream State (or its citizens) to construct water storage facilities in an upstream State, provided that certain conditions are observed. See Add. 7a-8a. Article IX obligates the States to administer the Compact through appropriate officials and "to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact." Add. 8a-9a. It also provides that those officials "may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact," and it directs the pertinent federal agencies to assist state officials in the collection and correlation of data. Add. 9a.

Articles X and XI address issues of federal authority that had prompted the President's veto of the previous compact proposal. Article X states that nothing in the Compact shall (a) impair federal rights, power, or jurisdiction over waters of the Basin; (b) subject the United States to state taxes or require the United States to reimburse the States for lost tax revenues resulting from federal water development projects; and (c) subject any property of the United States to state law that would not apply in the absence of the Compact. Add. 9a-10a. Article XI provides, in essence, that (a) any beneficial consumptive use of the United States within a

State shall be charged against the State's compact allocation; (b) when exercising its paramount powers, the United States shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use is of paramount importance to the development of the Basin; and (c) the United States will respect valid, pre-existing, beneficial consumptive uses. Add. 10a-11a.

D. Post-Compact Development

After approving the Compact, Congress authorized a system of federal water development and management projects as part of the Missouri River Basin Development Program. See Flood Control Act of 1944, ch. 665, § 9, 58 Stat. 891. This Program, also known as the Pick-Sloan Plan, authorizes the Army Corps of Engineers and the Bureau of Reclamation to construct and operate a coordinated system of reservoirs for multiple purposes, including irrigation, flood control, power development, fish and wildlife protection, and recreation. See S. Doc. No. 247, 78th Cong., 2d Sess. (1944).

Between 1945 and 1964, the United States constructed nine federal reservoirs in the Republican River Basin. The Corps of Engineers completed the previously authorized Harlan County Reservoir in Nebraska (see p. 3, *supra*) and the Milford Reservoir in Kansas. The Bureau of Reclamation established four water resource development divisions, which include seven reservoirs in Kansas and Nebraska. The Bureau's projects, operated in conjunction with the Corps' Harlan County facilities, provide water to six irrigation districts and service 136,528 acres of farmland in the Republican River Basin. The Corps' Harlan County and Milford projects also support a variety of other purposes, including flood control, recreation, and fish and wildlife needs. See *Resource Management Assessment: Republican River Basin*, *supra*, at 4-5, 13-23.

E. The Current Controversy

The Republican River Compact imposes limitations on the quantity of water that Colorado and Nebraska may divert from the Republican River and its tributaries, based on an apportionment of the "virgin water supply." In accordance with Article IX of the Compact, the States have designated officials to administer the Compact's allocation limits. Beginning in 1959, the States each appointed a representative to a three-member administrative body, designated the Republican River Compact Administration (RRCA), to compute the Basin's annual "virgin water supply," which would in turn allow the States to determine, retrospectively, whether each State had stayed within its annual allocation. See RRCA, *First Annual Report for the Year 1960* (April 4, 1961). The RRCA has since published and updated formulas for computing both the virgin water supply and consumptive use. See RRCA, *Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use, August 19, 1982* (rev. June 1990).

Since 1959, the States have debated whether groundwater usage should be included in determining whether a State has exceeded its allocation. Kansas has asserted that groundwater usage should be included to the extent that groundwater development affects surface flow by syphoning water from the Republican River or its tributaries or by otherwise reducing the water that would be available for diversion from the sources identified in the Compact. As part of its First Annual Report, the RRCA elected to include in its calculations groundwater that is pumped "from the alluvium along the stream channels." Committee on Procedure and Computation of Annual Virgin Water Supply, *Formulas for the Computation of Annual Virgin Water Supply* 3 (Apr. 4, 1961). The RRCA decided, however, not to include pumping from upland areas known as "table-lands." It concluded that "[t]he determination of the effect of pumping by 'table-land'

wells on the flows of the streams in the Republican River Basin must await considerably more research and data regarding the character of the ground-water aquifers and the behavior of ground-water flow before even approximate information is available as to the monthly or annual effects on stream flows." *Ibid.*

Since publishing its First Annual Report, the RRCA has been unable to make further progress on the appropriate treatment of groundwater under the Compact. In recent years, Kansas and Nebraska have strongly disagreed on the issue. Because the three-member RRCA can adopt regulations only through "unanimous action," Compact Article IX (Add.9a), the RRCA has not resolved the dispute and has retained, virtually verbatim, the statement on groundwater set forth in the 1959 annual report. See *Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use, August 19, 1982*, *supra*, at 7. Indeed, apparently as a result of this dispute between Kansas and Nebraska, the RRCA has ceased to calculate the virgin water supply and state compliance with allocation limits. Compare Nebr. Br. in Opp. 16-17 with Kan. Reply Br. 7-8.

Kansas now seeks relief from this Court. It asserts that Nebraska has violated the Compact by "allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries," which has "resulted in the appropriation by the State of Nebraska of more than its allocated equitable share of the waters of the Republican River" and has "deprived the State of Kansas of its full entitlement under the Compact." Compl. ¶ 7; see Br. in Support of Compl. 12-14. Nebraska argues that the Court should not exercise jurisdiction over this matter because Kansas has failed to show that Nebraska's alleged actions have injured Kansas, Br. in Opp. 9-16, and because Kansas may seek relief through alternative means, *id.* at 17-21. Nebraska additionally asserts that "ground-

water is not governed by the Compact." *Id.* at 10; see also *id.* at 20.

DISCUSSION

The United States submits that Kansas should be granted leave to file its complaint. Kansas alleges an interstate dispute of sufficient importance to warrant this Court's exercise of its original jurisdiction, and there is no other forum in which the controversy practicably can be resolved. The United States additionally suggests that this Court provide a mechanism for deciding a potentially dispositive threshold legal issue—whether the Republican River Compact restricts a State's consumption of groundwater—before referring the matter to a Special Master. Resolution of that legal issue, which could be placed before the Court through a motion to dismiss, would greatly facilitate the disposition of a controversy that experience suggests might consume many years of litigation and many millions of dollars in expenses.

1. The Complaint Of Kansas Alleges A Controversy That Warrants The Exercise Of Original Jurisdiction

This Court has original and exclusive jurisdiction over a judicial case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 118 S. Ct. 1726 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). Nevertheless, the Court has determined that its exercise of original jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); *Texas* v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file a complaint in a dispute arising under the Court's exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State,"

focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (internal quotations and citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Applying those standards, the United States concludes that the complaint of Kansas presents a matter warranting the exercise of original jurisdiction.

a. In claiming that Nebraska is depriving Kansas of its lawful share of the water of an interstate stream, Kansas asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Texas* v. *New Mexico*, 462 U.S. at 567; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902). Indeed, this Court has granted Kansas and Nebraska each leave to file separate original actions, which are currently pending on this Court's original docket, raising comparable claims. See *Kansas* v. *Colorado*, 475 U.S. 1079 (1986) (No. 105, Original); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987) (No. 108, Original). Kansas's claims respecting the Republican River are of similar "seriousness and dignity." *Mississippi*, 506 U.S. at 77.[3]

Nebraska nevertheless opposes Kansas's motion for leave to file a complaint on the ground that Nebraska's claimed

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[3] In *Kansas* v. *Colorado*, this Court ruled that Colorado has unlawfully consumed groundwater associated with the Arkansas River, south of the Republican River Basin, in violation of the Arkansas River Compact. See *Kansas* v. *Colorado*, 514 U.S. 673 (1995). The matter is pending before a Special Master on the question of remedy. See 118 S. Ct. 849 (1998). In *Nebraska* v. *Wyoming*, Nebraska asserts, among other things, that Wyoming has unlawfully consumed groundwater associated with the North Platte River, north of the Republican River Basin, in violation of this Court's North Platte Decree. See *Nebraska* v. *Wyoming*, 515 U.S. 1. That suit has not yet gone to trial, but the parties have settled a number of the issues apart from the issue of groundwater consumption.

violations and Kansas's alleged injuries are not sufficiently demonstrated or serious to justify the exercise of original jurisdiction. Br. in Opp. 7-17. Nebraska specifically argues that the records of the RRCA indicate that, "over the 55-year history of the Compact, Kansas failed to receive its total allocation of water only one time, in the drought year of 1992," *id.* at 11, and that, from 1992 through 1995, "Nebraska consumed less than its allocation, even if groundwater use is included as Kansas alleges," *id.* at 15. See also *id.* at A1-A5.

The United States submits that Nebraska's reliance on the RRCA records is misplaced and does not provide an adequate basis for denying Kansas leave to file a complaint. Kansas and Nebraska agree that the Republican River Compact places enforceable limitations on the compacting States' consumption of water that is directly diverted from streams within the Basin. But Kansas, unlike Nebraska, interprets the Compact also to place enforceable limitations on the consumption of water that is indirectly diverted from those streams through pumping of groundwater that is "hydraulically connected to the Republican River and its tributaries" in the sense that the pumping reduces surface flow. See Kan. Compl. ¶ 7; Kan. Br. in Support of Compl. 2; compare Neb. Br. in Opp. 10, 20. The gravamen of Kansas's complaint is that Nebraska is violating the Compact limitations because Nebraska diverts both surface water and groundwater, and Nebraska does not take into full account the full effects of consuming groundwater in reducing surface flows. See Kansas Compl. ¶ 7.[4]

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[4] Kansas's allegation that Nebraska's groundwater pumping is, in fact, depleting the surface flow of the Republican River is not without foundation. The Bureau of Reclamation's 1996 *Resource Management Assessment: Republican River Basin* states that "the area's overall water supply has decreased in part because groundwater development in the Republican River Basin has increased." *Id.* at 14. See generally *id.* at Attachment B, Part V (Groundwater Research Management Assessment). The Bureau has informed us, however, that it has not definitively deter-

Nebraska cannot rely on the RRCA's past water supply and consumption records to show that Kansas has suffered no substantial injury because those records rely on formulas that take into account consumption of only groundwater pumped from the alluvium of the Republican River and its tributaries, and not consumption of all groundwater that might affect the surface flow. See pp. 9-10, *supra*. The inclusion of non-alluvial groundwater would increase the computed virgin water supply and potentially affect each State's allocation. Nebraska's derivative calculations are therefore uninformative on the matter that Kansas has placed at issue: whether Nebraska is indirectly diverting surface flow, in excess of its Compact allocation, by pumping non-alluvial groundwater.[5]

At bottom, Nebraska's resort to RRCA records fails to confront the crux of Kansas's argument. The RRCA's current methodology expressly does not take into account the diversion of all groundwater that may reduce surface flow. If Kansas is correct that the Compact limits such diversions, then Nebraska's refusal to observe that limitation would result in a violation of the Compact. This issue presents a matter of sufficient seriousness and dignity to warrant exercise of this Court's original jurisdiction.[6]

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mined whether or to what extent groundwater pumping depletes the specific water supply sources identified in the Compact.

[5] Nebraska takes the position that the Compact does not impose any limitations on its pumping of groundwater, Br. in Opp. 10, 20, and it apparently treats the RRCA's inclusion of alluvial groundwater as going beyond the Compact's limitations. Furthermore, Nebraska seems to treat alluvial groundwater as the only form of groundwater that might affect surface flow. Nebraska's assertions (Br. in Opp. 11-12, 15) that RRCA records include "groundwater usage" are correct only if one neglects all non-alluvial groundwater consumption, which is the precise matter that concerns Kansas. See Kan. Reply Br. 2, 4-5.

[6] Nebraska makes a number of secondary arguments that Kansas has failed to demonstrate injury. Those arguments, however, are also unpersuasive. For example, Nebraska assumes (Br. in Opp. 10-12) that Kansas

b. Nebraska's suggestion that Kansas might resolve this dispute through means other than an original action (Br. in Opp. 17-21) is also unpersuasive. Kansas and Nebraska disagree, at a fundamental level, on the meaning of the Republican River Compact, and none of the alternative fora that Nebraska identifies is capable of resolving that interstate dispute. Nebraska contends, for example, that Kansas might achieve its objectives if Kansas citizens or local water districts commence district court actions against Nebraska officials or citizens, or, alternatively, if Kansas builds upstream reservoirs to augment its water supply. Br. in Opp. 18-19. Kansas has brought this action, however, to assert its own sovereign rights, vis-à-vis Nebraska, arising from an interstate compact. The actions that Nebraska proposes would in no sense provide a forum for Kansas to assert its Compact rights. See *Mississippi* v. *Louisiana*, 506 U.S. at 76-78; cf. *Nebraska* v. *Wyoming*, 515 U.S. at 20-21.

Nebraska also suggests further negotiations and mediation. Br. in Opp. 19-21. As a general matter, we agree that this Court should consider whether the States have attempt-

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cannot demonstrate injury if Kansas has received its full aggregate water allocation under the Compact. The Compact, however, allocates water on a source-by-source basis, see Art. IV (Add. 5a-7a), and Kansas should therefore be entitled to demand that Nebraska adhere to its allocation from specific sources, even if Kansas receives an aggregate water supply equal to the sum of all of the sources. Nebraska also makes the unwarranted assumption (Br. in Opp. 12-13) that Kansas does not suffer an injury under the Compact unless it can show that it would consume the water that it is denied. The Compact creates a right to receive the water that is promised, and Kansas may sue to enforce that right. See *Nebraska* v. *Wyoming*, 507 U.S. 584, 592 (1993); *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940). Nebraska additionally argues that Kansas should not be granted leave to file a complaint until it comes forward with a more specific showing of the groundwater depletions. Br. in Opp. 9-10, 15-16. That contention, however, is inconsistent with this Court's practice in comparable original actions, including Nebraska's suit against Wyoming, which also alleges groundwater depletions in general terms. See *Nebraska* v. *Wyoming*, 515 U.S. at 6.

ed to resolve their dispute through negotiation or alternative dispute resolution techniques as an important factor bearing on whether to exercise its original jurisdiction. But in this case, it is clear that Kansas and Nebraska have attempted consensual resolution and have deadlocked over the threshold question of whether the Compact limits groundwater pumping. Indeed, the deadlock over that issue has led to a breakdown in the operation of the RRCA, which has been unable to resolve that dispute. See Kan. Br. in Support of Compl. 7-10; Neb. Br. in Opp. 16-17, 19-21; Kan. Reply 7-10.

The RRCA considered the role of groundwater in its first annual meeting, and it decided to limit its diversion measurements to only alluvial groundwater pumping because consideration of table-land groundwater pumping required "more research and data." *Formulas for the Computation of Annual Virgin Water Supply* (April 4, 1961), *supra*, at 3. Since that time, the RRCA, which can act only through unanimous vote, has made no progress in resolving the issue. At the same time, the compacting States have moved further apart. Kansas now contends that the Compact should take into account all groundwater consumptive use that reduces surface flow, Br. in Support of Compl. 2, 7-9, while Nebraska asserts that groundwater pumping is not a subject of the Compact at all, Br. in Opp. 10, 20. The current deadlock presents a situation in which an important interstate dispute can be resolved only through the action of this Court. See *Texas* v. *New Mexico*, 462 U.S. at 568-569.

2. Before Referring The Matter To A Special Master, This Court Should Resolve The Threshold Legal Issue Of Whether The Republican River Compact Restricts A Compacting State's Consumption Of Groundwater

Upon granting a motion for leave to file a complaint, the Court typically directs the defendant to file an answer and then, shortly thereafter, refers the matter to a Special Master to conduct appropriate proceedings. See, *e.g.*, *New Jer-*

sey v. *New York*, 511 U.S. 1080 (1994); 513 U.S. 924 (1994); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987); 483 U.S. 1002 (1987). In appropriate situations, however, this Court has resolved preliminary or controlling legal issues before, or in lieu of, referring the case to a Master. See *United States* v. *Alaska*, 499 U.S. 946 (1991); 501 U.S. 1248, 1275 (1991); 503 U.S. 569 (1992); *United States* v. *California*, 332 U.S. 19, 21-24 (1947). We suggest that this controversy presents a situation in which the latter course should be followed.

Nebraska and Kansas disagree over a threshold legal issue: Whether the Republican River Compact places limitations on the right of a compacting State to consume groundwater. Nebraska specifically asserts that the Compact imposes no such limitations. Br. in Opp. 10, 20. If this case were governed by the Federal Rules of Civil Procedure, Nebraska would be entitled to test its theory by moving to dismiss Kansas's complaint for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). See also, *e.g.*, 2A J. W. Moore, *Moore's Federal Practice* ¶ 12.07[2.-5] (2d ed. 1996); 5A C. A. Wright & A. R. Miller, *Federal Practice and Procedure* §§ 1355-1356 (2d ed. 1990). Although the Federal Rules are not strictly applicable to this Court's original actions, they provide a guide to the Court's proceedings. See Sup. Ct. R. 17.2. In this case, the Court may wish to apply the procedure suggested by Federal Rule 12(b)(6) to facilitate the disposition of this action.

Specifically, we suggest that, if this Court grants Kansas leave to file its complaint, the Court should grant Nebraska leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6), limited to the question of whether, as a matter of law, the Republican River Compact limits Nebraska's right to consume groundwater. Kansas could then respond to that motion, and the Court could decide that threshold legal issue. If the Court concludes—as Nebraska has urged—that the Compact imposes no such limit, then the

Court can promptly dismiss the action without consuming the time and expense of appointing a Special Master. If the Court concludes that the Compact does impose such a limitation, or that resolution of that issue necessarily requires development of facts outside the pleadings, then the Court can deny the motion and refer the matter to a Special Master to conduct the course of future proceedings. In that situation, the Court's decision would provide the Master and the parties with definitive guidance on the appropriate scope of those proceedings, which would assist the Master in managing discovery and trial and might encourage renewed negotiations and settlement. See *Texas* v. *New Mexico*, 462 U.S. at 574-576.

The United States' experience with original actions involving interstate groundwater disputes, most notably *Kansas* v. *Colorado* (No. 105, Original) and *Nebraska* v. *Wyoming* (No. 108, Original), suggests that the proposed course would be highly desirable in this case. Interstate water disputes pose complex trial-management problems once they proceed past the pleading stage. Cf. *Nebraska* v. *Wyoming*, 515 U.S. at 8-9. The factual issues turn on complex questions of meteorology, hydrology, geology, engineering, and economics, which must be applied to thousands of square miles of varied terrain and land uses. The litigation, particular discovery and trial preparation, correspondingly tends to be extraordinarily complicated, time-consuming, and expensive. See, *e.g.*, First Report of the Special Master in *Kansas* v. *Colorado*, No. 105, Original, Vols. I to IV (1994).[7] At the same time, the complexity and high stakes of the litigation

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[7] We note that the Master fees and expenses to date have totaled more than $1.5 million in *Kansas* v. *Colorado* (covering 1986 to 1997) and more than $ 1.1 million in *Nebraska* v. *Wyoming* (covering 1987 to 1998). Those assessments do not include the parties' attorneys' fees and expenses. Nebraska has reportedly spent $16 million on the *Nebraska* v. *Wyoming* litigation, which has not yet gone to trial. See G. Jensen, *Suit Has Hurdles, Jess Says*, Kearney Hub (May 28, 1998).

may encourage wasteful pretrial skirmishing far removed from the core controversy that prompted the lawsuit.[8]

We therefore believe that the Court should take advantage of procedural mechanisms that may permit prompt resolution of a threshold legal issue that divides the parties. The question whether the Compact limits groundwater consumption presents a discrete and straightforward issue of compact interpretation that may be decided as a matter of law through familiar tools of compact construction. In resolving that legal issue, the Court would first examine the text of the Compact. An interstate compact is both a contract and a law of the United States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). Like other federal laws, if the text, read in light of its context, is unambiguous, it is conclusive. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. at 690 ("We conclude that the clear language of Article IV-D [of the Arkansas River Compact] refutes Colorado's legal challenge."); see also *Texas* v. *New Mexico*, 462 U.S. at 567-568 ("our first and last order of business is interpreting the compact"); see also *New Jersey* v. *New York*, 118 S. Ct. at 1735-1738; *Central R.R.* v. *Mayor and Aldermen of Jersey City*, 209 U.S. 473, 478-479 (1908). If the Court finds the text ambiguous, it may also consider other reliable documentary indicia of the parties' intent, including materials submitted to Congress in support of congressional approval. See

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[8] For example, in *Nebraska* v. *Wyoming*, one party recently wrote to the Special Master as follows: "It is not [our] desire to drag these proceedings out any further. [Our] concern relates to the fact that Wyoming's response to Basin's motion to strike Nebraska's reply to Wyoming's response to Basin's petition to intervene is actually a response to Nebraska's response to Wyoming's first motion to strike, which has been denied. In this regard, Basin as well is arguing the merits of the briefing schedule set forth in the Order of October 9, 1998, in the guise of arguing about the propriety of responding to new arguments without seeking leave to do so." No. 108, Original, Letter to Special Master Owen Olpin (Oct. 27, 1998).

Oklahoma v. *New Mexico*, 501 U.S. at 235 n.5; *Texas* v. *New Mexico*, 462 U.S. at 568 n.14; *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934). To the extent the parties' practical construction of the Compact bears on its meaning, see *New Jersey* v. *New York*, 118 S. Ct. at 1760 (Scalia, J., dissenting), the Court may take judicial notice of the RRCA's annual reports.[9]

Because this Court uses the Federal Rules of Civil Procedure as merely a guide to the conduct of original actions, it may tailor appropriate procedures to facilitate its decision-making process. See *United States* v. *Alaska*, 499 U.S. at 1248, 1275. We suggest that, if the Court decides to grant Nebraska leave to file a motion to dismiss, the Court may wish to (a) specify the precise legal question that the parties shall address; (b) set a schedule for Nebraska to file its motion and supporting brief, for Kansas to file its responsive brief, and for Nebraska to file a reply; and (c) impose appropriate page limits for the briefs. If the Court elects to follow this course, the United States would file a brief as amicus curiae on the question posed.

CONCLUSION

The motion of the State of Kansas for leave to file a complaint should be granted. The Court may wish to grant the State of Nebraska leave to file a motion to dismiss.

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[9] As we have noted, the RRCA's annual reports indicate that the RRCA adopted a compromise in 1959 on the question of groundwater usage that takes into account alluvial groundwater pumping, but does not include groundwater pumping from other sources. See pp. 9-10, 14, *supra*. In our view, the RRCA's compromise action neither categorically precludes Nebraska from asserting as a matter of law that the Compact does not limit groundwater consumption, nor categorically precludes Kansas from asserting as a matter of law that the Compact limits consumption of all groundwater that may affect surface flow.

Respectfully submitted.

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DECEMBER 1998

ADDENDUM

Act of May 26, 1943, Ch. 104, 57 Stat. 86

AN ACT

To grant the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska relating to the waters of the Republican River Basin, to make provisions concerning the exercise of Federal jurisdiction as to those waters, to promote flood control in the Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact authorized by the Act entitled "An Act granting the consent of Congress to the States of Colorado, Kansas, and Nebraska to negotiate and enter into a compact for the division of the waters of the Republican River", approved August 4, 1942. (Public Law 696, Seventy-seventh Congress; 56 Stat. 736), signed by the commissioners for the States of Colorado, Kansas, and Nebraska at Lincoln, Nebraska, on December 31, 1942, and thereafter ratified by the Legislatures of the States of Colorado, Kansas, and Nebraska, which compact reads as follows:

"REPUBLICAN RIVER COMPACT

"The States of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a State, or collectively as the States), having resolved to conclude a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, Chapter 545, 2nd Session) and pursuant to Acts of their respective

Legislatures have, through their respective Governors, appointed as their Commissioners:

M.C. Hinderlider, for Colorado
George S. Knapp, for Kansas
Wardner G. Scott, for Nebraska

who, after negotiations participated in by Glenn L. Parker, appointed by the President as the Representative of the United States of America, have agreed upon the following articles:

"Article I

"The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

"The physical and other conditions peculiar to the Basin constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

"Article II

"The Basin is all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas. The main stem of the Republican River extends from the junction near Haigler, Nebraska, of its North Fork and the Arikaree River, to its junction with Smoky Hill River near Junction City, Kansas. Frenchman Creek (River) in Nebraska is a continuation of Frenchman Creek (River) in Colorado. Red Willow Creek in Colorado Red Willow Creek in Colorado is not identical with the stream having the same name in Nebraska. A map of the Basin approved by the Commissioners is attached and made a part hereof.

"The term 'Acre-foot', as herein used, is the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet.

"The term 'Virgin Water Supply', as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

"The term 'Beneficial Consumptive Use' is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

"Beneficial consumptive use is the basis and principle upon which the allocation of water hereinafter made are predicated.

"Article III

"The specific allocations in acre-feet hereinafter made to each State are derived from the computed average annual virgin water supply originating in the following designated drainage basins, or parts thereof, in the amounts shown:

"North Fork of the Republican River drainage basin in Colorado, 44,700 acre-feet;

"Arikaree River drainage basin, 19,610 acre-feet;

"Buffalo Creek drainage basin, 7,890 acre-feet;

"Rock Creek drainage basin, 11,000 acre-feet;

"South Fork of the Republican River drainagebasin, 57,200 acre-feet;

"Frenchman Creek (River) drainage basin in Nebraska, 98,500 acre-feet;

"Blackwood Creek drainage basin 6,800 acre-feet;

"Driftwood Creek drainage 7,300 acre-feet;

"Red Willow Creek drainage basin in Nebraska, 21,900 acre-feet;

"Medicine Creek drainage basin, 50,800 acre-feet;

"Beaver Creek drainage basin, 16,500 acre-feet;

"Sappa Creek drainage basin, 21,400 acre-feet;

"Prairie Dog Creek drainage basin, 27,600 acre-feet;

"The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

"Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the

future computed virgin water supply of such source bears to the computed virgin water supply used herein.

"Article IV

"There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin, 10,000 acre-feet;

"Arikaree River drainage basin, 15,400 acre-feet;

"South Fork of the Republican River drainage basin, 25,400 acre-feet;

"Beaver Creek drainage basin, 3,300 acre-feet; and

"In addition, for beneficial consumptive use in Colorado, annually, the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and of the Red Willow Creek drainage basin in Colorado.

"There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"Arikaree River drainage basin, 1,000 acre-feet;

"South Fork of the Republican River drainage basin, 23,000 acre-ffet;

"Driftwood Creek drainage basin, 500 acre-feet;

"BeaverCreek drainage basin, 6,400 acre-feet;

"Sappa Creek drainage basin, 8,800 acre-feet;

"Prairie Dog Creek drainage basin, 12,600 acre-feet;

"From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

"In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

"There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500)acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basinin Colorado, 11,000 acre-feet;

"Frenchman Creek (River) drainage basin in Nebraska, 52,800 acre-feet;

"Rock Creek drainage basin, 4,400 acre-feet;

"Arikaree River drainage basin, 3,300 acre-feet;

"Buffalo Creek drainage basin, 2,600 acre-feet;

"South Fork of the Republican River drainagebasin, 800 acre-feet;

"Driftwood Creek drainage basin, 1,200 acre-feet;

"Red Willow Creek drainage basin in Nebraska, 4,200 acre-feet;

"Medicine Creek drainage basin, 4,600 acre-feet;

"Beaver Creek drainage basin, 6,700 acre-feet;

"Sappa Creek drainage basin, 8,800 acre-feet;

"Prairie Dog Creek drainage basin, 2,100 acre-feet;

"From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of up stream basins otherwise unallocated herein, 132,000 acre-feet.

"The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

"Article V

"The judgment and all provisions thereof in the case of Adelbert A. Weiland, as State Engineer of Colorado, et al. v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U.S. 498, affecting the Pioneer Irrigation ditch or canal, are hereby recognized as binding upon the States, and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

"The water heretofore adjudicated to said Pioneer Canal by the District Court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.

"Article VI

"The right of any person, entity, or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper State for the purpose of regulating water herein allocated for beneficial consumptive use in such lower

State, shall never be denied by an upper State; provided, that such right is subject to the rights of the upper State.

"Article VII

"Any person, entity, or lower State shall have the right to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivisions of the State in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said political subdivisions of the State.

"Article VIII

"Should any facility be constructed in an upper State under the provisions of Article VI, such construction and the operation of such facility shall be subject to the laws of such upper State.

"Any repairs to or replacements of such facility shall also be made in accordance with the laws of such upper State.

"Article IX

"It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect

and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

"The United States Geological Survey, or whatever federal agency may succeed to the functions and duties of that agency, in so far as this compact is concerned, shall collaborate with the officials of the States charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of this compact.

"Article X

"Nothing in this compact shall be deemed:

"(a) To impair or affect any rights, powers or jurisdiction of the Untied States, or those acting by or under its authority, in, over,and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

"(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the Untied States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

"(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any

State to any extent other than the extent these laws would apply without regard to this compact.

"Article XI

"This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

"(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

"(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

"(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the

exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at that time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

"IN WITNESS WHEREOF, the Commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative orginial, and of which a duly certified copy shall be forwarded to the Governor of each of the State.

"Done in the City of Lincoln, in the State of Nebraska, on the 31st day of December, in the year of our Lord, one thousand nine hundred forty-two.

"M.C. HINDERLIDER
"Commissioner for Colorado
"GEORGE S. KNAPP
"Commissioner for Kansas
'WARDNER G. SCOTT
"Commissioner for Nebraska

"I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.

"GLENN L. PARKER
"Representative of the United States"

Sec. 2(a) In order that the conditions stated in article XI of the compact hereby consented to shall be met and that the compact shall be and continue to be operative, the following provisions are enacted –

(1) any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by such compact, shall be made within the allocations made by such compact for use in that State and shall be taken into account in determining the extent of use within that State;

(2) the United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters from multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of such compact and after consultation with all interested Federal agencies and the State officials charged with the administration of such compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(3) the United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction, in, over, and to such waters: *Provided*, That such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with such compact at the time of the impairment thereof, and was validly initiated under State law prior to the

initiation or authorization of the Federal program or project which causes such impairment.

(b) As used in this section –

(1) "beneficial consumptive uses" has the same meaning as when used in the compact consented to by Congress by this Act; and

(2) "Basin" refers to the Republican River Basin as shown on the map attached to and made a part of the original of such compact deposited in the archives of the Department of State.

Approved May 26, 1943.